No. 83-305

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

CALIFORNIA,

Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

*HARRY B. SONDHEIM
Head, Appellate Division

JOHN W. MESSER
Deputy District Attorney

RICHARD W. GERRY
Deputy District Attorney

849 South Broadway, 11th Floor
Los Angeles, California 90014
Telephone: (213) 974-5908

Attorneys for Amicus Curiae

*Counsel of Record for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-305

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

CALIFORNIA,

Petitioner.

v.

ALBERT WALTER TROMBETTA, et al.,

Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36.4 of the rules of this Court, Robert H. Philibosian, District Attorney of the County of Los Angeles, State of California, submits this amicus curiae brief in support of petitioner. The County of Los Angeles is a political subdivision of the State of California, and Robert H. Philibosian is the authorized law officer of said county.

SUMMARY OF ARGUMENT

In its opinion in the case at bar, the California Court of Appeal held that when law enforcement authorities utilize an intoxilyzer to test the breath of a person arrested for driving under the influence of intoxicating liquor, federal due process requires, as a condition precedent to the admission of the test results as evidence in a criminal action, that they obtain and preserve another breath specimen for later retesting by the accused. In reaching its decision the California court failed to consider the impact of California Vehicle Code section 13354, subdivision (b), which permits the accused to have an independent blood alcohol test in addition to that administered by law enforcement authorities. The statute provides:

> "(b) The person tested may, at his own expense, have a physician, registered nurse, licensed vocational nurse, duly licensed

clinical laboratory technologist or clinical laboratory bioanalyst, or any other person of his or her own choosing administer a test in addition to any test administered at the direction of a peace officer for the purpose of determining the amount of alcohol in his or her blood at the time alleged as shown by chemical analysis of his blood, breath, or urine. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of a peace officer."

In this amicus curiae brief we argue that this statutory right to an independent blood alcohol test, in itself, satisfies the requirements of due process. Through such an independent test, the accused will

be able to verify the accuracy of the original test administered by law enforcement authorities, and impeach the original test result at trial if it conflicts with the result of the independent test. In view of this right to an independent blood alcohol test, there is no need for law enforcement authorities, upon their own initiative, to preserve a separate sample of the accused's breath for later retesting. If the accused is concerned about the test's accuracy, he or she may exercise the right to take an additional test administered by a qualified person of his or her own choosing.

ARGUMENT

BY PERMITTING THE ACCUSED TO HAVE AN INDEPENDENT BLOOD ALCOHOL TEST ADMINISTERED BY A QUALIFIED PERSON OF HIS OR HER OWN CHOOSING, CALIFORNIA VEHICLE CODE SECTION 13354, SUBDIVISION (B), SATISFIES THE DEMANDS OF DUE PROCESS

On the issue of whether the accused's right to an independent blood alcohol test satisfies due process guarantees, State v. Larson (N.D. 1981) 313 N.W.2d 750, is directly in point.[1] In Larson a peace officer administered a breath test on a breathalyzer to the defendant, who had been arrested for driving while intoxicated. The defendant later demanded that the state provide him with a separate sample of his breath for the purpose of conducting an

---

[1]We have been unable to find any federal cases in point. Accordingly, in this brief we cite only state cases.

independent test. The state was unable to meet the request, as a separate breath sample had not been preserved. (The parties stipulated that it was physically possible to have preserved such a sample.) The defendant asserted that the state's failure to provide him with a breath sample for independent testing "lessens his ability to impeach the Breathalyzer results and constitutes a violation of his constitutional right to due process." (Id. at 752.)

The Supreme Court of North Dakota rejected the defendant's contention. The court observed that a state statute provided that "a person upon whom a law enforcement officer has administered a chemical test can have any qualified person of his own choosing administer a test or tests for his own use." (Ibid.)[2]

---

[2]The statute, section 39-20-02, N.D.C.C., provides as follows:

"'Persons qualified to administer test. Only a physician, or a qualified

"footnote 2 continued"

Thus, "[i]f that person desires samples of his breath for independent testing he has the right to acquire those samples himself with the assistance of any qualified person he chooses." (Id. at 752.) The court concluded that by permitting such a person to obtain his own breath sample, the statute "affords him a fair and reasonable opportunity to scrutinize and verify or impeach the results of the Breathalyzer test administered by the law enforcement officer and, thereby, comports with the due process requirements of the Constitution." (Id. at 753.)

"footnote 2 continued"

technician, chemist, or registered nurse acting at the request of a law enforcement officer may withdraw blood for purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a breath, saliva, or urine specimen. The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any

"footnote 2 continued"

As authority for its holding, the Larson court relied upon the opinion of the New Jersey Superior Court in State v. Bryan (1974) 133 N.J.Super. 369, 336 A.2d 511. In Bryan the defendant also had been arrested for drunk driving and had taken a breathalyzer test. The ampoule used in the test had been discarded by law enforcement authorities. The defendant contended that the loss of the ampoule denied her due process of law, as she was unable to test the contents of the ampoule to verify the accuracy of the test results. The Bryan

---

"footnote 2 continued"
administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of the test or tests taken at the direction of law enforcement officer. Upon the request of the person who is tested, full information concerning the test or tests taken at the direction of the law enforcement officer shall be made available to him.'" (State v. Larson, supra, at 752 [emphasis in original].)

court found her due process argument to be without merit.

Like North Dakota, New Jersey also had a statute granting the accused the right to have an independent blood alcohol test administered by a person of his or her own selection. The statute, however, differed from North Dakota's in that it required the police officer to inform the arrestee of the right to an independent chemical test, while the North Dakota statute imposed no such duty. The Bryan court held that the "statutory mandate provides a means consistent with 'due process' by which a defendant may verify the test" to which he or she has consented. (Id., 336 A.2d at 514.) The court reasoned that "[t]he State should not be forced to afford the defendant a second chance to check the workability of the machine when defendant has the opportunity under [the statute] to an independent

test." (Ibid.)

Other cases are consistent with the reasoning in Larson and Bryan. In State v. Young (1980) 228 Kan. 355, 614 P.2d 441, the defendant was administered a breath test on a gas chromatograph intoximeter. He contended that the test results should be suppressed because law enforcement authorities did not provide him with a sample of his breath for independent testing, and due process required that he be given such a sample. The Supreme Court of Kansas observed that a state statute, K.S.A. 8-1004, affords the accused the right to secure an additional chemical test by a physician of his or her own choosing.[3]

---

[3]The statute provides:

"'Without limiting or affecting the provisions of K.S.A. 8-1001 to 8-1003, the person tested shall have a reasonable opportunity to have an additional chemical test by a physician of his or her own choosing. In case the officer refuses to permit such additional chemical test to be

"footnote 3 continued"

(Like the North Dakota statute, the Kansas statute does not require law enforcement authorities to advise the accused of this right.) The Young court held that under the safeguards provided by this and other statutes, "the failure of the State to automatically furnish an accused with a sample of his own breath for independent testing is not a denial of due process." (Id., 614 P.2d at 447.)

In People v. Stark (1977) 73 Mich.App. 332, 251 N.W.2d 574, the defendant contended that the discarding of ampoules used in a breathalyzer test administered to him constituted a denial of due process. The Court of Appeals of Michigan noted that a state statute afforded the defendant an opportunity to have an independent blood alcohol test. Citing Bryan, the Stark

---

"footnote 3 continued"

taken, then the original test shall not be competent in evidence.'" (State v. Young, supra, 614 P.2d at 445.)

court concluded that "[t]his opportunity, which defendant did not exercise, renders his assertion of a due process violation less than persuasive." (Id., 251 N.W.2d at 576.)

In State v. Canaday (1978) 90 Wash.2d 808, 585 P.2d 1185, the Supreme Court of Washington held that the routine destruction and disposal of used breathalyzer test ampoules does not violate due process. The court observed that a person who has taken a breathalyzer test has the statutory right to an independent blood alcohol test administered by a qualified person of his or her own choosing, and that this right affords due process safeguards:

> "Persons arrested and asked to take a breathalyzer test are uniformly offered the opportunity to obtain their own best evidence for use at any trial resulting from

the conduct leading to their arrest. They have the right to obtain an independent test of their blood alcohol content administered by a qualified person of their own choosing. RCW 46.61.506(5). They are informed of this right when asked to take the test. Although we do not believe failure to obtain an independent test could amount to a waiver of any recognized constitutional right to due process, the statutory requirement demonstrates an important protection of the subject's right to fundamental fairness which is built into our Implied Consent procedure. Moreover, the exercise of this right would yield test results contemporaneous with those obtained by the State,

which could have considerable force in rebutting the State's evidence. Washington's procedure cannot be said to be fundamentally unfair." (Id., 585 P.2d at 1190.)

In State v. Helmer (S.D. 1979) 278 N.W.2d 808, 812, the Supreme Court of South Dakota stated that "we agree with those courts that have held that the accused's ability to have an independent blood test taken to challenge the breathalyzer result is sufficient protection of an accused's due process rights. [Citations.]"

As in the cases cited above, California Vehicle Code section 13354, subdivision (b), provides the accused with an opportunity to have a second blood alcohol test administered by a qualified person of his or her own choosing. If the accused takes advantage of this opportunity and the test

result conflicts with that obtained by law enforcement authorities in the original test, then at trial the accused will be able to impeach the original test result. Due process requires no more than that the accused be afforded this opportunity. If, on the other hand, the police refuse to allow the accused to procure a timely blood alcohol test, due process requires the suppression of the original test result. (Brown v. Municipal Court (1978) 86 Cal.App.3d 357, 361, 365, 150 Cal.Rptr. 216.)

The argument may be made, however, that the California statute fails to satisfy due process guarantees because it does not require the police to advise the accused of the right to procure a blood alcohol test on his or her own behalf.[4]

---

[4]This argument may be made by respondents, but not by defendants who are administered chemical tests of their

"footnote 4 continued"

This argument is without merit. In both State v. Larson, supra, and State v. Young, supra, similar statutes were deemed to comply with due process. Indeed, in Young the Supreme Court of Kansas specifically held that due process does not require such an advisement. The court reasoned "that all persons are presumed to know and

---

"footnote 4 continued"

breath in California after September 15, 1983. As of that date, a new statute, section 13353.5, was added to the California Vehicle Code which requires the police to inform the accused of the right to an independent chemical test and, upon the accused's request, to preserve a sample of the accused's blood or urine for later testing. (See Cal.Stats. 1983, c. 841, sec. 1.) The statute, which was enacted in response to the California Court of Appeal's decision in the case at bar, provides:

> "(a) In addition to the requirements of Section 13353, a person who chooses to submit to a breath test shall be advised before or after the test that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person

"footnote 4 continued"

are bound to take notice of general public laws of the state where they reside, as well as the legal effect of their acts." (Id., 614 P.2d at 445.)

"footnote 4 continued"

or any other person.

"(b) The person shall also be advised that, because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.

"(c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested."

In People v. Kovacik (1954) 205 Misc. 275, 128 N.Y.S.2d 492, the court applied the same reasoning used by the Young court. In Kovacik the defendant attacked the constitutionality of a New York statute permitting the accused to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer. The defendant contended that the statute was unconstitutional because it did not require the police officer to notify the accused of this right. In upholding the statute's constitutionality, the court declared,

> "It would seem that it is sufficient to say that all persons are presumed to know the law and are therefore presumed to be so informed as to this right. They should acquaint themselves, at

least with those laws most likely to affect their usual activities. The point is without merit." (Id., 128 N.Y.S.2d at 509.)[5]

---

[5]See also Prucha v. Department of Motor Vehicles (1961) 172 Neb. 415, 110 N.W.2d 75, in which the plaintiff contended that his driver's license was unlawfully revoked for refusal to take a blood alcohol test after his arrest for driving under the influence of intoxicating liquor. One of the grounds for his contention was that the police officer failed to advise him of the consequences of his refusal. The Supreme Court of Nebraska held that such an advisement was unnecessary, as "[t]he general rule is that all persons are presumed to know and are bound to take notice of general public laws of the country or state where they reside as well as the legal effect of their acts. [Citations.]" (Id., 110 N.W.2d at 80.) The Prucha court declared that the plaintiff "is presumed to know the law and he should acquaint himself, at least, with those laws which would affect him. [Citation.]" (Ibid.)

Furthermore, in Kesler v. Department of Motor Vehicles (1969) 1 Cal.3d 74, 78-79, 81 Cal.Rptr. 348, 459 P.2d 900, 904, the California Supreme Court also held that such an advisement was unnecessary. The Kesler court reasoned that "all that due process requires in the preservation of the rights of such persons is the availability of an opportunity for defendant to obtain a timely sampling of his blood in the manner required by law." (Id., 1 Cal.3d at 79, 459 P.2d at 904.)

Finally, in People v. Kerrigan (1967) 8 Mich.App. 216, 154 N.W.2d 43, the Court of Appeals of Michigan held that the police were not required to advise the accused of the right to an independent chemical test. The court reasoned: "The right in question on appeal is a statutory and not a constitutional right. While an accused must be advised of many constitutional rights, he need not be advised of

all of his statutory rights unless the statute expressly requires it." (Id., 154 N.W.2d at 45.)

In support of its holding in the case at bar, the California Court of Appeal majority and concurring opinions cited the cases of Garcia v. Dist. Court, 21st Jud. Dist.(1979) 197 Colo. 38, 589 P.2d 924 and Baca v. Smith (1980) 124 Ariz. 353, 604 P.2d 617.[6] Neither of these cases, however, addressed the issue of whether due process demands would be met if the accused had the statutory right to have an additional blood alcohol test administered by a qualified person of his or her own choosing. Garcia and Baca, therefore can provide no guidance as to the resolution of this issue.

---

[6]In State v. Young, supra, 614 P.2d at 446, the Supreme Court of Kansas criticized both cases. (See pages 21-22 of the Petition for Writ of Certiorari.)

CONCLUSION

When the police administer a breath test to a person arrested in California for driving under the influence of intoxicating liquor, that person has the statutory right to have an additional, independent blood alcohol test administered by a qualified person of his or her own choosing. By exercising this right, the accused will be able to verify the accuracy of the breath test administered by the police. If the result of the accused's own test conflicts with the test result obtained by the police, the accused's test result will be admissible at trial to impeach the prosecution's evidence.

Due process requires no more than that the accused not be denied the opportunity to exercise the statutory right to an independent, additional chemical test. Due process does not mandate that law

enforcement authorities be transmuted into defense investigators obligated to collect and preserve evidence that might be favorable to the accused when the accused can do so through his or her own efforts. The imposition of such a burden upon law enforcement authorities would, without justification, radically alter their traditional

role in the criminal justice system and significantly increase the cost of enforcing drunk driving laws.[7]

Respectfully submitted,

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

JOHN W. MESSER
Deputy District Attorney

RICHARD W. GERRY
Deputy District Attorney

Attorneys for Amicus Curiae

---

[7]Although we understand that the competing interests involved are different, it is at least somewhat ironic that, if the contentions of respondent and the California Court of Appeal are accepted, law enforcement must go through whatever is required to literally capture the proverbial "breath of air" in a DUI prosecution, while law enforcement need not retain the body of the victim in a murder prosecution for independent analysis. (See People v. Vick (1970) 11 Cal.App.3d 1058, 1064-1066, 90 Cal.Rptr. 236. Juxtaposing the two situations highlights the fallacy of simply postulating that because breath samples are used by the prosecution to determine the

"footnote 7 continued"

"footnote 7 continued"

arrestee's blood alcohol content, other breath samples must be saved for the defendant. Due process simply requires that the defendant be afforded the opportunity to gather evidence regarding his blood alcohol content that will allow him to meet the prosecution evidence. California Vehicle Code section 11354(b) affords just such an opportunity.

DECLARATION OF SERVICE ON THE COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, Harry B. Sondheim, is the Head Deputy of the Appellate Division of the Los Angeles County District Attorney's Office and a member of the bar of this court. On February 23, 1984, under the undersigned's supervision, Erlinda R. Maliksi, an employee of said office, placed in the United States mail, with first class postage prepaid, a box containing forty copies of the attached amicus curiae brief addressed as follows:

OFFICE OF THE CLERK
United States Supreme Court
Washington, D.C. 20543

Said amicus curiae brief was thus mailed on February 23, 1984, which is within the permitted time.

DATED: February 23, 1984

HARRY B. SONDHEIM

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen year of age, not a party to the within cause and employed in the Appellate Division of the Office of the District Attorney of Los Angeles County, with offices located at 849 South Broadway, Los Angeles, California 90014-3296. I am under the supervision of Harry B. Sondheim, the head deputy of said division and a member of the bar of this court, at whose direction the service of the attached amicus curiae brief was made. On February 23, 1984, I served three copies of said brief on each of the following persons by depositing three true copies

thereof, enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail in the City of Los Angeles, in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

CHARLES R. B. KIRK
Deputy Attorney General
6000 State Building
San Francisco, CA 94102

JOHN F. DE MEO, Esq.
Attorney at Law
1022 Mendocino Avenue
Santa Rosa, CA 95401
Attorney for Albert W. Trombetta

FREDERICK J. HALEY, Esq.
Attorney at Law
1 Kaiser Plaza
Oakland, CA 94612
Attorney for Gregory M. Ward

THOMAS R. KENNEY, Esq.
Attorney at Law
200 E. Street
P.O. Box 1896
Santa Rosa, CA 95402
Attorney for Michael G. Cox, Thomas N. Muldoon, Clinton J. Brown, Densel L. Furner, Patricia L. Keeffe, Herbert J. Berryessa, and James K. Schneider

JOHN A. PETTIS, Esq.
Attorney at Law
1034 Court Street
Martinez, CA 94612
Attorney for Gale B. Berry

Executed on February 23, 1984, at Los Angeles, California.

ERLINDA R. MALIKSI